STATE OF MICHIGAN

COURT OF APPEALS

WESTFIELD INSURANCE COMPANY, Plaintiff-Appellee,	FOR PUBLICATION March 8, 2012
v	No. 300941 Antrim Circuit Court
KEN'S SERVICE and MARK ROBBINS, Defendants-Appellants.	LC No. 10-008571-CK Advance Sheets Version

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

M. J. KELLY, J. (*dissenting*).

Because I believe that the trial court erred in its interpretation of the word "upon" in the subject underinsured motorist insurance policy, I would reverse its decision to grant summary disposition in favor of plaintiff, Westfield Insurance Company, and instead grant summary disposition in favor of defendants, Ken's Service and Mark Robbins. Therefore, I must respectfully dissent.

Robbins worked for Ken's Service as a tow truck driver. On the evening of the accident, Robbins was sent to tow a police vehicle out of a ditch. After pulling his tow truck to the shoulder of the highway, Robbins activated the emergency lights, got out of the tow truck, hooked cables to the police cruiser, and walked back to the truck's bed. He then began the process of pulling the police vehicle from the ditch by activating the levers on a control panel located on the driver's side of the truck. He averred in an unrebutted affidavit that he was leaning on the tow truck for balance and support with both his hands touching the truck; his right hand was on the control panel, and with the left he grasped the truck's railing. It was then that a passing motorist struck him and caused him serious injuries.

At issue is Robbins's entitlement to underinsured motorist coverage under Westfield's policy insuring the tow truck. Under the policy, an "insured" is entitled to uninsured or undersinsured motorist coverage resulting from "bodily injury" caused by "an accident." The policy provides that, if the named insured is an individual, the insureds are the "Named Insured and any 'family members'" as well as anyone "else 'occupying' a covered 'auto' or a temporary

substitute for a covered 'auto.'"[1] Thereafter, the policy defines "occupying" as "in, upon, getting in, on, out or off." We are asked to determine whether, under the definitions that Westfield provided in its insurance policy, Robbins was "upon" the tow truck at the time of the accident.

As noted by the majority, our Supreme Court has interpreted this identical language. See *Rednour v Hastings Mut Ins Co*, 468 Mich 241; 661 NW2d 562 (2003). In *Rednour*, the plaintiff was struck by an oncoming vehicle while changing a flat tire on the insured vehicle. *Id.* at 242. The plaintiff was approximately six inches away from the insured vehicle when he was struck by the other car. He had loosened the lug nuts on the wheel and was moving toward the rear of the vehicle when he was hit. *Id.* The plaintiff claimed that he was an insured entitled to no-fault benefits because he was "occupying" the vehicle, as defined by both the no-fault act and the language of the policy. He argued that he was "upon" the vehicle because he was pinned between the two vehicles during the collision. *Id.* at 249. The Court noted that it had already interpreted the meaning of "occupant" under the no-fault statute and declared that a person could not be an "occupant" *under the no-fault act* unless they were "'physically inside'" the vehicle when struck. See *id.* at 247, citing *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531-532; 502 NW2d 310 (1993) (*Rohlman I*). However, because the language of the policy in its case, like the policy here, broadly defined "occupying" as "'in, upon, getting in, on, out or off'" the insured vehicle, *Rohlman I*, 442 Mich at 528 n 8, the Court in *Rohlman I* remanded the matter to this Court to consider whether the plaintiff's conduct fell under the broader definition of "occupying" stated in the policy. *Id.* at 535.

On remand, this Court noted that physical contact with the insured vehicle is required to be "upon" the vehicle, although the person need not be completely physically supported by the vehicle. *Rohlman v Hawkeye-Security Ins Co (On Remand)*, 207 Mich App 334, 357; 526 NW2d 183 (1994) (*Rohlman II*) (noting that a child could be "on" a scooter by having one foot on it and another on the ground). While the *Rednour* Court agreed with the *Rohlman II* statement that a person did not need to be physically inside the vehicle to be "upon" it, the Court nevertheless held that physical contact alone is insufficient to show that "the person was 'upon' the vehicle so as to be 'occupying' the vehicle." *Rednour*, 468 Mich at 250. The Court explained: "The relevant dictionary definitions . . . clarify that one must be *on* or *up and on* a vehicle in order to be 'upon' it." *Id.*

More recently still, this Court analyzed the identical contractual language in *Bledsoe v Auto Owners Ins Co (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2003 (Docket No. 236735). There the plaintiff's foot was run over by a truck while he was stopped at a toll booth to pay the toll. While he was leaning on the insured

[1] Though not fully developed in the circuit court, Ken's Service—a business—was listed by the Westfield policy as "An Individual" with the result being that his family members, who presumably did not drive this large, commercial tow truck, would have been covered for these injuries regardless of whether they were "upon" the vehicle and yet Robbins, the employee who actually drove the tow truck on a regular basis and as part of his employment duties, was not. This is not an issue before us on appeal but remains a conundrum.

vehicle and bending over to locate some dropped change, the truck attempted to pass him and ran over his foot. *Id.* at 2. This Court noted that the insurance policy provided greater coverage than that guaranteed under the no-fault act. *Id.* After distinguishing *Rednour*, the Court in *Bledsoe* concluded that the plaintiff was insured because he was "upon" the truck:

> In the instant case, plaintiff testified that he was balancing himself with one hand *on the step of the insured truck* when the accident occurred. Even under the *Rednour* . . . Court's restricted definitions, plaintiff was, according to his testimony, "upon" the truck at the time of the accident. We believe that a commonsense interpretation of the term "upon" leads to this conclusion. Moreover, the Supreme Court in *Rednour* . . . indicated (1) that one must be "on" a vehicle to be "upon" it and (2) that a dictionary is an appropriate reference tool in giving meaning to the terms at issue here. See [*Rednour*, 468 Mich at 250]. *Random House Webster's College Dictionary* (1997) lists the following as the first definition of "on": "so as to be or remain supported by or suspended from." Plaintiff testified that he was balancing himself with one hand on the step of the truck when the accident occurred. If the factfinder were to believe plaintiff's testimony, then (1) plaintiff clearly was being "supported by" the truck, (2) he therefore was "occupying" the vehicle under the terms of the Auto Owners' policy, and (3) the parked vehicle exclusion in [the] policy does not apply. The trial court properly denied summary disposition to Auto Owners with respect to the issue of PIP [personal protection insurance] benefits. [*Id.* at 3.]

Although not binding precedent, I find this reasoning persuasive. Robbins's unrebutted affidavit indicates that he was leaning on the tow truck for balance and support at the time he was struck by the passing automobile. Therefore, like the plaintiff in *Bledsoe*, he was "on" ("supported by") or "upon" and thus "occupying" the vehicle in accordance with the policy. And because there is no evidence to rebut that Robbins was being supported by the vehicle, the trial court should have granted summary disposition in favor of defendants.

If Westfield wanted a more restrictive definition for "occupying," it could have chosen to insert a different definition into its policy. As it is, the words it chose were "in, upon, getting in, on, out or off." And, because the definition of "on" is "so as to be or remain supported by or suspended from," Robbins plainly demonstrated that he comes within the policy's definition of "occupying" and coverage should have been afforded him.

For this reason, I respectfully dissent.

/s/ Michael J. Kelly